

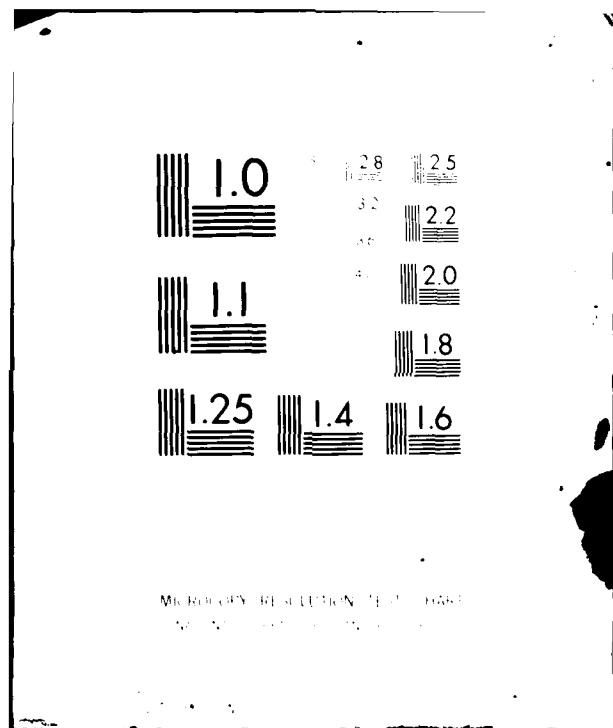
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HUMAN RESOURCES
DIVISION

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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The Honorable Max Baucus
United States Senate

Dear Senator Baucus:

Subject: Social Security Administration Policies for
Managing Its Administrative Law Judges
(HRD-81-91)

On April 3, 1980, you requested that we review several issues concerning whether the Social Security Administration's (SSA's) Administrative Law Judges (ALJs) are required to hear a certain number of cases a year or are limited in the number of reversals they can make. You also requested that we assess the impact on an ALJ's ability to conduct fair and proper hearings if SSA has such policies regarding production and reversal rates.

BACKGROUND

The Office of Hearings and Appeals (OHA) ^{1/} administers the hearings and appeals process within SSA. Social Security claimants who are not satisfied with SSA decisions can present their case before one of OHA's 700 ALJs. An ALJ reviews and decides the case based on the merits of the claim and applicable Social Security laws and regulations. If a claimant is not satisfied with an ALJ's decision, he or she can request a review by OHA's Appeals Council and finally by a U.S. district court.

SSA's hearings and appeals process conforms to the principles of the Administrative Procedure Act (APA). APA specifies certain procedural elements for a hearing which must be present to meet due process requirements. These include adequate notice, access to evidence, right to cross examination, right to counsel, and written findings and reasons for the decision. APA also requires that the person taking the evidence and rendering the decision be impartial and not have been involved in the case previously as an agency staff person. Finally, APA ensures the independence of the ALJs from the agency in which they operate by assigning responsibility for determining their qualifications, compensation, and tenure to the Office of Personnel Management.

^{1/}Formerly the Bureau of Hearings and Appeals.

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OHA employs about 700 ALJs to hear claimants' cases involving retirement, survivor, disability, black lung, supplemental security income, and health insurance issues. About 95 percent of the hearing requests in fiscal year 1980 involved disability claims. Social Security claimants' hearing requests have risen from 154,962 in fiscal year 1975 to 252,023 in fiscal year 1980.

Despite the addition of about 100 more ALJs since fiscal year 1975, increases in support staff, and a doubling of the average number of decisions handled by an ALJ each month to 32, the number of hearing requests pending reached an all time high of 123,188 in March 1981. In addition to the ever increasing number of hearing requests, OHA has had to operate under a number of court orders which mandate disposition of Social Security claims within designated time limits. As of January 1981, there were five orders affecting OHA operations in four States.

We found that the issues involved in this review are not new. In June 1979, SSA and OHA management agreed to revise certain policies regarding the establishment and use of production statistics and goals for ALJs. Management agreed to revise training, transfer, and travel policies to remove any specific mention of production figures as criteria and not to establish production goals or quotas for ALJs. In settling the lawsuit, management admitted no wrongdoing, and the ALJs acknowledged that SSA and OHA have the authority to exercise administrative and management functions over their ALJs. This agreement was part of the settlement of a lawsuit filed by five ALJs from the Kansas City hearing office. The ALJs believed that these policies interfered with their ability to hold fair hearings and infringed on their judicial independence. In February 1981, the board of directors of the Association of ALJs in the Department of Health and Human Services (ALJ Association) voted to study whether to have the Kansas City lawsuit reopened. According to the president of the ALJ Association, some ALJs believe that the situation is now worse than the period preceding the lawsuit.

OHA is currently involved in a lawsuit begun by a New York ALJ in 1978. The lawsuit, which is still pending, challenges three management practices. The first practice involved the "Regional Office Peer Review Program." The ALJ believed that through this program OHA has attempted to control the conduct of hearings by dictating the proper length of hearings and opinions, the amount of evidence required, and the proper use of expert

witnesses. The second practice dealt with establishing production quotas for ALJs. The ALJ alleged that the quotas were arbitrary and constituted a performance rating forbidden by APA. The final practice challenged involved the "Quality Assurance Program" which, according to the ALJ, attempted to control the number of decisions denying Social Security benefits to claimants.

Some of the management practices which precipitated the law-suits were identified in a January 27, 1979, report by the staff of the Subcommittee on Social Security, House Committee on Ways and Means. These practices included

- establishing a production goal of 26 cases a month for ALJs;
- warning low producing ALJs that removal action would be initiated if their production did not improve;
- requiring ALJs, when they travel to a hearing site, to hear a minimum of 40 cases; and
- considering an ALJ's production rate in deciding whether the ALJ would be transferred to a location of his or her choice.

More recently, by enacting the Social Security Disability Amendments of 1980 (Public Law 96-265), the Congress expressed its concern about the variance in reversal rates among ALJs and the high number of cases reversed by ALJs without a hearing. The amendments require the Secretary of Health and Human Services to implement a program of reviewing, on his own motion, decisions rendered by ALJs and to report the program's progress to the Congress by January 1, 1982. The Congress recognized that several factors could be causing the situation and requested that the Secretary identify their effect. These factors included

- the claimant appearing for the first time before a decisionmaker,
- additional evidence being submitted,
- ALJs and State agencies operating under different policy guidelines, and
- State agency denial rates changing significantly.

We also previously studied the management of the administrative law process in Federal agencies and issued a report to the Congress in May 1978 entitled "Administrative Law Process: Better

Management Is Needed" (FPCD-78-25, May 15, 1978). We recommended that agencies work with the chief ALJs and individual ALJs to develop objective performance standards delineating what is expected of all ALJs in terms of quality and quantity of work. The agencies would then be able to

- assure themselves that cases are settled equitably and expeditiously,
- accurately determine the number of ALJs needed to accomplish their objectives,
- provide the Office of Personnel Management with objective assessments of ALJ performance to be used in determining Office of Personnel Management adequacy in recruiting and certifying ALJs,
- provide feedback to ALJs, and
- initiate adverse action proceedings based on objective criteria.

In a followup report entitled "Management Improvements In The Administrative Law Process: Much Remains To Be Done" (FPCD-79-44, May 23, 1979), we reported that only a few agencies had developed objective performance standards for ALJs.

Objective, scope, and methodology

Our objective in this study was to identify the key areas of ALJ concern, obtain and review supporting evidence, and discuss these concerns with OHA management. We limited our review to the management policies and initiatives made since fiscal year 1980 because allegations before that time were included in the settlement of the Kansas City lawsuit. We interviewed several ALJs and board members of the ALJ Association and reviewed documents submitted by them to ascertain their concerns. We discussed these concerns with OHA officials. A sworn affidavit was obtained from the Associate Commissioner for OHA concerning his position on ALJ production quotas and reversal rates.

We did not attempt to assess whether management's initiatives to increase productivity or efforts to study the reversal rates of individual ALJs affected an ALJ's ability to conduct fair hearings because such an analysis would have been extremely subjective in nature. We did, however, discuss these issues with management and with several ALJs and received the following comments. OHA officials do not believe that the decisional quality has diminished during the last few years when increases in the average production

rate have been realized. Some ALJs believe that the increase in the hearing reversal rate--from 42 percent in fiscal year 1975 to 56 percent by November 1980--is due to management policies directed at increasing productivity. Since the time required to reverse a case is generally less than to affirm, more cases can be decided in a given time frame. Other reasons, such as allowing awards based on a claimant's vocational factors and an increase in State agency denial rates, have also been offered to explain the increased reversal rate.

AREAS OF ALJ CONCERN

The ALJs we talked with were concerned about several management initiatives to improve productivity and monitor or influence reversal rates. Generally, the ALJs believed that these initiatives violated statutory provisions against performance ratings for ALJs and interfered with the judicial independence required by APA. We did not find, however, that OHA maintained a policy of initiating removal actions against ALJs who fail to dispose of cases within a certain time frame or have high reversal rates. During fiscal year 1980, two cases were referred to OHA's Office of Special Counsel for preliminary work before deciding whether to file charges against the ALJs with the Merit Systems Protection Board. ^{1/} Neither case involved charges of low productivity or abnormal reversal rates, and in neither case did OHA initiate removal action. Specific concerns raised by the ALJs and addressed in our review are discussed below.

Low producer letter

Between June and December 1980, 28 ALJs received letters from their respective regional chief ALJ soliciting ways management could assist them in improving their productivity. An additional four ALJs were counseled by their regional chiefs. These 32 ALJs had average production rates of 20 or fewer cases a month for the 6-month period between September 1979 and February 1980. OHA central office prepared the list and distributed it to the regional chief ALJs.

The officers and directors of the ALJ Association sought to have the letters sent to one region rescinded. They believed that the letters constituted a rating and thus violated the statutory

^{1/}OHA must propose removal action to the Board and show good cause why the ALJ should be removed. The decision to remove the ALJ is made by the Board.

prohibition against rating the performance of an ALJ. They also stated that the standard used for the rating was based solely on production averages without considering other factors, such as support staff, quality, and annual or sick leave.

OHA officials told us that the intent of the letters was only to solicit methods to improve productivity and was not intended as a performance rating nor placed in the ALJ's personnel file. They also stated that the letters were not rescinded.

One ALJ who received a letter filed a grievance with OHA. He believed that, although it did not constitute a performance rating, the letter threatened punitive action by requiring him to improve his processing or defend his current level of production. The examiner appointed to hear the case did not agree with the ALJ. Instead the examiner agreed with OHA that the letter was only asking for the ALJ to determine if there were any "opportunities to reduce case processing time without sacrificing the quality of casework."

The chief ALJ has recently sent letters to 32 ALJs who are considered to be low producers. These ALJs produced an average of 20 or fewer cases a month during fiscal year 1980.

Staff attorney guidelines

During June 1980, OHA's central office distributed guidelines for the effective use of staff attorneys to the regional chief ALJs. The guidelines stated that staff attorneys were encouraged to write a minimum of 30 decisions a month and, to the extent possible, not to write short form reversal decisions. 1/ The officers and directors of the ALJ Association requested in September 1980 that the guidelines be rescinded in their entirety. They believed the guidelines would, among other things, sacrifice case quality and indirectly place a quota on ALJs. Similar concerns were expressed by OHA's Special Counsel in 1979 when he reviewed and commented on the proposed production standards for support staff. He recommended that quality and timeliness standards be developed instead of production standards.

The Associate Commissioner wrote the vice president of the ALJ Association in November 1980 and told him he would not rescind the guidelines. He explained that the production guide of 30 decisions a month was not an arbitrarily derived number, but was based

1/The guidelines state that these decisions should be prepared by hearing assistants or other qualified staff.

on an analysis of time actually spent by staff attorneys on cases. He further stated that the guide was not a quota which must be met, but rather was a goal which central office was using as a performance guideline.

One regional chief ALJ we talked with told us that it would take a first-rate attorney to produce 30 affirmations a month as implied by the OHA guidelines. He said this was especially true since ALJs use attorneys differently. He believed that a staff attorney should be able to write 20 decisions a month, including both affirmations and reversals.

We were told that OHA is now developing performance standards for all hearing office staff, except ALJs, to comply with the Civil Service Reform Act. The standards will be approved by SSA which will then negotiate with the unions representing hearing office staff. The proposed standards include a quantitative standard and should be implemented by October 1981.

Hearing office experiments

OHA is currently conducting an experiment in six hearing offices to determine if productivity can be increased by removing certain functions from an ALJ's responsibility. The functions include overseeing the development of evidence, preparing the case for hearing, scheduling the hearing, and drafting the proposed decision under the direction of the ALJ. In the six hearing offices, special units consisting of staff attorneys or hearing analysts and clerical staff are performing these duties. This staff came from existing ALJ units and works on cases for two or more ALJs instead of one which is the practice in most other hearing offices. The deputy chief ALJ believes the experiment will show that each ALJ will be able to hear 60 cases a month.

The ALJ Association requested that the experiment be withdrawn in an October 1980 letter to the Associate Commissioner. The ALJs believed that such a realignment of responsibilities would impinge on a claimant's protection under APA because an ALJ would no longer oversee all phases of case preparation, hearing, concluding evidentiary development, and final disposition. They also believed the realignment would increase the chance of error without increasing accountability and thereby possibly subject ALJs to unfair criticisms since they are responsible for the decision. The Associate Commissioner did not respond to the letter nor did he cancel the experiment. OHA officials said that the experiment will end in June 1981 and is one of several being conducted under the Disability Awards Reform Experiments.

OHA production reports

A few ALJs told us that they felt pressured to produce cases because OHA publishes ranked lists of ALJ disposition rates. The ALJs were concerned about the publication of ALJ disposition rates because they can be misleading in that they do not include the number of support staff assigned to an ALJ, the case mix, the type of decision rendered, and the method of handling the case (on-record decision or a hearing decision).

OHA's standard time values seem to support the ALJ's concerns. For example, an ALJ will normally spend about 1.65 hours working on a disability case if it is reversed without holding a hearing, but will spend 4.66 hours on the same case if it is affirmed after holding a hearing.

OHA officials explained that the report is used for internal management purposes and has limited distribution within the agency. OHA management does not believe the statistics are misleading. They said that cases are assigned randomly to ALJs and that this should result in each ALJ receiving about the same number of cases in each category and should produce about the same result as the process of handling a case. They also stated that it was not true that high producing ALJs necessarily have higher than average reversal rates.

Hearing office visit by the deputy chief ALJ

In December 1980, OHA's deputy chief ALJ visited one of the hearing offices because of concerns expressed by the Social Security Regional Commissioner. The purpose of the visit was to ascertain why the reversal rate for the office was so high. The hearing office had a reversal rate of 92 percent in November 1980 compared to 66 percent for another hearing office in the same State and 55.6 percent nationally.

We interviewed each ALJ assigned to the hearing office and obtained a copy of the deputy chief ALJ's report. None of the ALJs felt pressured by the deputy chief ALJ's visit.

The deputy chief ALJ sent a report of his findings to OHA's Associate Commissioner. He told us this report was also sent to the Commissioner of Social Security. A sample of cases was reviewed by OHA's Office of Appraisal and a memorandum was sent by the deputy chief ALJ to the ALJs in the hearing office suggesting ways for the ALJs to improve their hearing decisions.

Planned study of high/
low reversing ALJs

During 1979 OHA's Appeals Council proposed a study of high and low reversing ALJs. The proposal called for an Appeals Council review of cases decided by ALJs who, on a quarterly basis, had a reversal rate significantly variant from the average. At least 13 ALJs were to be selected for review each quarter. If problems with the quality of the decisions were found, the ALJs were to be counseled.

In October 1979, 11 high and 3 low reversing ALJs were selected. Two hundred and forty-six of their cases were forwarded to the Appeals Council for review. In November 1979, the regional chief ALJs met with the chief ALJ and told him that the proposal to conduct the study in secret did not seem proper.

In December 1979, the chief ALJ notified the Associate Commissioner about the regional chiefs' concern regarding the study. According to the memorandum, the regional chiefs condemned the study because of the "explosive nature of the ALJ reaction to any plan to review high/low reversals."

The Associate Commissioner announced in February 1980 that he was canceling the study because of the regional chief ALJs' concerns. He also stated that the ALJ cases selected for review in October were returned without review to the appropriate program office.

One of the ALJs selected for review requested information about the study under the Freedom of Information Act. He believed that the study constituted an illegal performance rating.

ASSOCIATE COMMISSIONER'S POSITION
ON QUOTAS AND REVERSAL RATES

The Associate Commissioner stated that he has neither imposed, directly or indirectly, a production quota nor has he threatened to initiate removal action if an ALJ did not produce a specified amount of work within a given time frame. He said, however, that he would not tolerate poor work habits, inefficiency, or laziness and that he expects all employees to meet minimally acceptable standards.

The Associate Commissioner also said that he does not believe any action on management's part "has affected the reversal rate or has tended to pressure or intimidate the ALJ corps in any way."

He said that he is concerned, however, when he notes that there are extreme variations in the reversal rates.

Finally, the Associate Commissioner said that he does not believe that any actions taken by management have adversely affected the quality of the hearing process. He does not believe that the ALJ corps could or "would be influenced by alleged management actions which supposedly are intended to subvert their will to perform their jobs with integrity."

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We did not ask SSA for written comments on this report in order to expedite its issuance; however, we obtained oral comments which are incorporated where applicable.

As requested by your office, we will make no further distribution of this report until 30 days from its issue date, unless you publicly announce its contents earlier. At that time, we will make copies available to the Secretary of Health and Human Services, the Commissioner of Social Security, the Office of Personnel Management, the Merit Systems Protection Board, the cognizant Committees of the Congress, and other interested parties.

Sincerely yours,



Gregory J. Ahart
Director